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No.

Supreme Court, U.S.
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DEC 28 1987
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented For Review

1. Does issuance of a visa titled "Diplomatic" by the United States to the representative of a foreign sovereign who qualifies for it entitle that representative who relies on issuance of the visa to diplomatic immunity?

2. Do *United States v. Inadi*, 106 S.Ct. 1121 (1986), *United States v. Bourjaily* 107 S.Ct. 2775 (1987), and the Compulsory Process Clause of Amendment VI, *United States Constitution*, require something more than mere judicial discretion in deciding a motion for severance by a defendant against whom *FRE* 801(d)(2)(e) conspirator statements are to be offered?

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument:	
This Court should determine whether a foreign official who qualifies for and is issued a visa titled "Diplomatic", and relies on that status in traveling to the United States, is entitled to immunity	4
This Court should consider whether its decisions in *United States v. Inadi*, 106 S.Ct. 1121 (1986) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment Compulsory Process Clause require a more stringent standard for deciding severance motions than the exercise of judicial discretion	5
APPENDIX	
Order of Honorable Sidney M. Aronovitz, U.S.D.J., Dated July 14, 1986	A-1
Order of Honorable Samuel J. Smargon, U.S.D.J., Dated July 9, 1986	A-4
Relevant Portions of Hearing Transcript, Dated September 4, 1986	A-6

Table of Authorities

United States Constitution, Amendment VI 5,6,7

Bourjaily v. United States, 107 S.Ct. 2775 (1987) . 5,7

United States v. Inadi, 106 S.Ct. 1121 (1986) 5,6,7

United States v. Daly, 756 F.2d 1076, 1079 (5th Cir. 1985) 5

United States v. Egorov, 222 F.Supp. 106 (E.D.N.Y. 1963) 4,5

United States v. Fitzpatrick, 214 F.Supp 425 (S.D.N.Y. 1963) 4

Talavera v. State, 227 So.2d 493 (Fla.Dist.Ct. 1969), *aff'd in part, quashed in part, State v. Talavera*, 243 So.2d 595 (Fla. 1971) 6

Title 18, *United States Code*, Section 1952(a)(2) .. 2

Title 21, *United States Code*, Section 963..... 2

Rule 801(d)(2)(e), *Federal Rules of Evidence* 5,6

22 CFR 41.102(a) 4

22 CFR 41.124(d)(2)..... 4

Jurisdictional Statement

The jurisdiction of this Court is invoked pursuant to Section 1254 of Title 28, *United States Code*, and Rule 21 of the *Rules of this Court*, to review by writ of certiorari the judgment of the United States Court of Appeals for the Eleventh Circuit dated September 23, 1987, rehearing denied October 27, 1987, affirming a judgment of the United States District for the Southern District of Florida entered November 17, 1986. The mandate issued on November 6, 1987.

Constitututional Provision & Regulations

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Amendment VI, *United States Constitution*

> "A non-immigrant alien . . . in possession of a diplomatic passport or its equivalent shall, if otherwise qualified, be eligible to receive a diplomatic visa irrespective of his classification under Section 41.12." 22 CFR Section 41.102(a).

> "The format of the diplomatic visa shall be the same as a regular non-immigrant visa except that it shall bear the title 'diplomatic'." 22 CFR Section 41.124(d)(2)

Statement of the Case

Petitioner Etienne Boerenveen, a Suriname national, a graduate of the Royal Dutch Military Academy, one of five members of Suriname's Military Authority and Chairman of Suriname's Fisheries Commission, was convicted with one Cilvion Heymans and Heymans' son, Ricardo, of conspiring to violate the Travel Act (18 *USC* 1952(a)(2)) and conspiring to import and distribute cocaine. (21 *USC* 963)

In the Fall of 1985 an Agent of the United States Drug Enforcement Administration, acting in an undercover capacity, sought to purchase cocaine from Cilvion Heymans, a Dutch national whose son, Ricardo, was a close friend of Petitioner Etienne Boerenveen's. Heymans told the undercover agent there was no cocaine available. In February 1986 the agent again approached Heymans and was again told there was no cocaine available. However, representing to the agent that he was very friendly with "the leader of the country", Heymans suggested another venture, offering to arrange for the use of "the Country of Suriname" as a refueling and transhipment point for cocaine en route from South America. In some half dozen telephone conversations between February 25, 1986 and March 20, 1986, Heymans and the agent arranged to meet in Miami on March 21, 1986, a meeting to which Heymans said he would bring "[t]he man that is ruling the country" without ever mentioning the name of that person.

On March 21, 1986, under a Suriname diplomatic passport with a Visa issued and entitled "Diplomatic" by the United States Embassy in Paramaribo and accompanied by Suriname's Prime Minister and their wives, Petitioner Etienne Boerenveen arrived in Miami to attend to certain consular matters, purchase machinery and equipment for Suriname's Fisheries Commission, and spend some leisure time with his wife and another couple.

Lured to a meeting with the undercover agent on March 21, 1986 by Heymans' representations they would be meeting with persons who wanted to invest in legitimate commercial ventures

in Suriname, Petitioner Boerenveen shortly found himself listening to a proposal to insure safe and secure refueling and transit stations in Suriname for the shipment of cocaine from South America against the payment of substantial monies. After they left the meeting, Petitioner Boerenveen, who had been responsible for authorizing Suriname's cooperation with the Drug Enforcement Administration in the Fall of 1985 to stop the use of Suriname as a way-station for cocaine from South America, berated Heymans for his deceit. On March 24, 1986, after completing part of his official business in Miami and having just been told by Heymans that the undercover agent already had an operation in Suriname, Petitioner Boerenveen again met the undercover agent, purposed to get the agent who was posing as an international drug smuggler within the territorial jurisdiction of Suriname. When the meeting ended on March 24, 1986, without final agreement or passage of money, Petitioner Boerenveen, Heymans and Heymans' son were arrested and subsequently indicted.

Invoking diplomatic immunity, Petitioner Boerenveen moved to dismiss the indictment prior to, during and at the conclusion of the trial. As well, prior to trial Petitioner Boerenveen moved to sever his trial from that of Heymans, supporting the motion with Heymans' affidavit which confirmed that Petitioner Boerenveen was unaware of the earlier communications between Heymans and the agent and the illicit purpose of the proposed transaction until the March 21, 1986 meeting and established Heymans' willingness to testify on behalf of Petitioner Boerenveen if they were tried separately.

The District Court denied both motions and that determination was affirmed without opinion.

Argument

THIS COURT SHOULD DETERMINE WHETHER A FOREIGN OFFICIAL WHO QUALIFIES FOR AND IS ISSUED A VISA TITLED "DIPLOMATIC", AND RELIES ON THAT STATUS IN TRAVELING TO THE UNITED STATES, IS ENTITLED TO IMMUNITY

In *United States v. Fitzpatrick*, 214 F.Supp. 425 (S.D. N.Y. 1963) the Court concluded that "once a diplomat is received, he is thereby entitled, without more, under the Law of Nations, to full diplomatic immunity."

Petitioner Etienne Boerenveen, an official of the Republic of Suriname who held a diplomatic passport and qualified for a diplomatic visa under 22 CFR Sect. 41.102, was issued a visa by the United States clearly imprinted and entitled "Diplomatic". 22 CFR Chapter l(e), Section 41.124(d)(2); see also, *United States v. Egorov*, 222 F. Supp. 106, 107 (E.D.N.Y. 1963). Relying on issuance of the diplomatic visa, Petitioner Etienne Boerenveen traveled to the United States from Suriname in the company of Suriname's Prime Minister, was permitted entry without submitting to the customary formalities attendant on entering the United States, including clearing customs and immigration checks.

The holding below that imprinting a classification symbol on a diplomatic visa nullifies the imprinted "Diplomatic" title on the visa is in utter conflict with 22 CFR 41.102(a) and 41.124(d)(2), and subjects a foreign official who relies on a diplomatic passport and a United States diplomatic visa to the caprice of the bureaucrat who imprints the diplomatic visa with a classification symbol the legal implications of which were unknown to both the foreign official and his government.

At a time in history when travel by and relations between representatives of Nations require that rules regulating diplomatic status be clear and immutable, this Court should

clarify the holding below by determining precisely what indicia of "acceptance and recognition of . . . diplomatic status" establishes conclusively that a representative of a foreign sovereign is entitled to the protection of diplomatic immunity. *United States v. Egorov*, 222 F.Supp. at 108.

Petitioner Etienne Boerenveen was eligible for and was issued a diplomatic visa by the United States. The obligation of the United States to recognize a status thus conferred and confirmed under regulations promulgated by its State Department, codified by its legislature, and recognized by the Law of Nations should be fully articulated by this Court.

THIS COURT SHOULD CONSIDER WHETHER ITS DECISIONS IN *UNITED STATES V. INADI*, 106 S.Ct. 1121 (1986) AND *BOURJAILY V. UNITED STATES*, 107 S.Ct. 2775 (1987) AND THE SIXTH AMENDMENT COMPULSORY PROCESS CLAUSE REQUIRE A MORE STRINGENT STANDARD FOR DECIDING SEVERANCE MOTIONS *THAN THE EXERCISE OF JUDICIAL DISCRETION*

In *United States v. Inadi*, 106 S.Ct. 1121 (1986), the Court concluded that unavailability of the declarant was not a prerequisite to admissibility of a conspirator statement under *F.R.E.* Rule 801(d)(2)(E), and in *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) the Court held that independent indicia of reliability of a conspirator statement was not a prerequisite to admissibility, permitting the trial court to consider the conspirator statement itself as evidence of reliability.

These decisions and "the well-known abuse of discretion standard used to review a district court's refusal to sever", *United States v. Daly*, 756 F.2d 1076, 1079 (5th Cir. 1985), deprive one defendant in a conspiracy case of the Sixth Amendment right to compulsory process where, as here, the prosecution predicates virtually all of its proof against that defendant on conspirator

statements of a defendant jointly indicted and the trial court denies severance in the exercise of judicial discretion.*

In deciding that unavailability was not a prerequisite to admissibility of a conspirator statement, in *Inadi* this Court observed that "[t]he Compulsory Process Clause would have aided [the defendant] in obtaining the testimony of these declarants", suggesting a higher standard than abuse of discretion is required when a defendant seeks the testimony of an 801(d)(2)E) declarant for trial.

Here, Petitioner Boerenveen's right to compulsory process to contest the 801(d)(2)(E) statements which constituted the most damaging evidence against him was denied by the simple exercise of judicial discretion without a higher standard to comport with the Compulsory Process clause. Indeed, one Court noted that

> [t]he state argues that the granting *vel non* of a motion for severance is discretionary with the trial judge and that the burden of showing an abuse of such discretion is upon the appellant. Ordinarily this is a sound contention. But *the real issue* here *is the right to compulsory process*; and the question of *severance is involved only* incidentally *to the extent that severance may be the only expedient to protect such right*. In such a case the matter of discretion is extremely limited if not entirely eliminated." *Talavera v. State*, 227 So.2d 493, 495 (Fla.Dist.Ct. 1969), *aff'd in part, quashed in part, State v. Talavera*, 243 So.2d 595 (Fla. 1971) (Emphasis supplied)

This Court should grant *certiorari* to consider to what extent and under what circumstances its decisions in *United States v.*

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* During argument of the appeal, the United States Attorney conceded that the trial court erred in denying severance on the basis that Heymans' supporting affidavit "does not contain specific exonerative facts which would warrant a severance".

Inadi, 106 S.Ct. 1121 (1986), *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause require granting a severance to a defendant against whom 801(d)(2)(E) statements by a jointly indicted defendant will provide the most substantial evidence.

Dated: December 23, 1987

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-305-CR-ARONOVITZ

UNITED STATES OF AMERICA

v.

ETIENNE BOERENVEEN, RICARDO HEYMANS and CILVION HEYMANS

Defendants.

ORDER

THIS CAUSE came before the Court for hearing and oral argument, held on Friday, July 11, 1986, upon several motions filed by the defendants in the above-styled cause. The Court having considered the motions, the supporting and opposing memoranda of law, and the argument of counsel, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That the appeal by defendant Boerenveen from the United States Magistrate's order, entered July 9, 1986, denying this defendant's Motion to Dismiss the Indictment on the Ground of Diplomatic Immunity be, and the same is, hereby DENIED for the reasons stated upon the record during the hearing on defendants' motions held on July 11, 1986.

2. That, as to the appeal by the defendants from the magistrate's order denying their Motions to Dismiss the Indictment on the Ground of Governmental Misconduct, the Court RESERVES RULING on this appeal pending resolution of the defendants' attempt to obtain the testimony of the government's confidential informant currently residing in the Hague, Netherlands.

The United States is, however, ORDERED to produce to the defendants the following properly discoverable materials:

1.) The amount, date and nature of each and every payment made by the United States, or any agency thereof, to the confidential informant known as Dick Statiene, in the course of the investigation which preceeded the instant criminal prosecution as well as in any other investigations in which this confidential informant has been employed by, or on behalf of, any agency of the United States.

2.) Any contingency agreements entered into between the United States, or any agency thereof, and the confidential informant employed in the investigation which resulted in the arrest and indictment of these defendants.

The above information is to be conveyed to counsel for the various defendants by 9:00 A.M. on Monday, July 14, 1986.

3. That, as to the Motion of defendant Ricardo Heymans to Take the Deposition of the Government's Confidential Informant in the Hague, Netherlands, the Court RESERVES RULING pending a report to the Court by the United States, to be given in open Court on Tuesday, July 15, 1986 at 9:00 A.M., concerning the availability of the deponent for either a voluntary deposition or one arranged under the applicable treaties in force between the Netherlands and the United States of America.

4. That the defendants' Motion that the Government Produce the two agents of the Drug Enforcement Agency whose testimony is sought by the defendants concerning their participation in drug enforcement activities in Suriname be, and the samae is hereby GRANTED.

5. That the Motions filed on behalf of each defendant, requesting leave of the Court to Adopt each and every Motion filed by other defendants in this cause be, and the same is, hereby GRANTED. Same rulings apply.

6. That the date set for the trial of this cause, WEDNESDAY, JULY 16, 1986, remains the date for the commencement of trial unless continued by the Court upon the joint Motion of all defendants.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 14 day of JULY, 1986.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:

David M. Schenkman, Esq.
Bruce Fleisher, Esq.
Philip Gerson, Esq.
William Norris, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-305-Cr-ARONOVITZ

UNITED STATES OF AMERICA,
Plaintiff,

v.

ETIENNE BOERENVEEN, et al.,
Defendant.

ORDER

This cause, having come before the Court upon the defendants various motions, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion For Discovery of Promises, Payments, and Inducements made to Dick Stoteine is hereby denied as Moot. At the hearing held on July 8, 1986, the Government announced that the informant received $5,000 as a reward and $8,500 as reimbursement for expenses.

It is hereby RECOMMENDED as follows:

1. The Motion To Dismiss Indictment and for Discharge on the Ground of Diplomatic Immunity be DENIED. The additional evidence presented at the July 8, 1986, hearing does not alter the opinion of the undersigned magistrate that Commander Boerenveen is not entitled to diplomatic immunity. His Visa application (the new evidence) does not show in any way that he was either a part of the mission or performing mission functions.

2. The Motion to Dismiss Indictment on Grounds of Governmental Misconduct (filed by Ricardo Heymans) on the issue of

the non-production of the informant be DENIED. The Government announced in open Court, on or about May 29, 1986, that the informant *could not* and *would not* appear at the trial. He was in Europe, suffering from leprosy, having undergone major amputation surgery. The Government's attempts to produce the informant, by contacting the D.E.A. agent contact of the infomant, informing the agent of the necessity of the appearance at trial of the informant, and offering to pay the informant's expenses, are reasonable under the circumstances. *United States v. Polland*, 479 F.2d 310 (8th Cir. 1973). It is further

ORDERED, Pursuant to Southern District of Florida Local Magistrate Rule 4(b), the parties may serve and file written objections to this recommendation with the Honorable Sidney M. Aronovitz, United States District Judge, within five (5) days after being served a copy of this Report and Recommendation.

DONE AND ORDERED in Miami, Florida, on this 9th day of July, 1986.

/s/ Samuel J. Smargon
SAMUEL J. SMARGON
UNITED STATES MAGISTRATE

cc: Phillip Gerson, Esq.
William Norris, AUSA
David Shenkman, Esq.
Bruce Fleischer, Esq.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 86-305-Cr-SMA

UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
vs. :
:
ETIENNE BOEREN-VEEN, :
RICARDO HEYMANS and :
CILVION HEYMANS, :
:
Defendants. :

Courtroom 10
301 North Miami Avenue
Miami, Florida
Thursday, 3:00 p.m.
September 4, 1986

The above-entitled case came on for Special Hearing before The Honorable SIDNEY M. ARONOVITZ, United States District Judge, pursuant to Notice.

APPEARANCES:

WILLIAM NORRIS,
Assistant U.S. Attorney,
Attorney for Plaintiff.

PHILLIP GERSON, Esq. and
MYLES TRALINS, Esq.,
Attorneys for Defendant Boeren-Veen.

THE COURT: Thank you.

This Court has before it for consideration what was originally styled as the Defendant Boeren-Veen's motion to sever trial and which was referred to this Court by the United States Magistrate for ruling.

That motion has been renewed at this time, the motion to sever.

Also offered in conjunction therewith has been an affidavit attached to the renewed motion given by Cilvion Heymans, a codefendant herein.

The Defendant Boeren-Veen attempts to persuade the Court that the trial should be severed because the available testimony from Cilvion Heymans at a separate and later trial of Boeren-Veen would be the subject of a proper severance under Bird v. Wainwright, Tifford, the Prewett case, and others.

Having now heard the arguments of counsel, each respectively, and also having carefully considered the proffers made by each side as to the nature and type of evidence available, and having also recalled the substantial portions to two videotapes that had been previously reviewed by the Court and also being advised in the premises, I am going to deny the motion to sever the trial of Etienne Boeren-Veen, reserving the right to issue a written order setting forth more fully and thoroughly the grounds and the basis for the ruling.

Now, this denial is without prejudice to the Defendant Etienne Boeren-Veen at any point in time where it may be shown to be pertinent and proper in accordance with law, Bird v. Wainwright, and other cases, even during trial, that a severance is appropriate.

You can renew that motion at any time, including during trial.

But I believe frankly that under the circumstances in this case, the affidavit of Mr. Heymans is non-specific, it is extremely

generalized, it contains many conclusions and is not in itself exonerative, not within the tests of Bird and the progeny of Bird.

I feel that the Government has established a sufficient basis on proffer and the defendant, having been unable to produce evidence in the nature of testimony of Cilvion Heymans, when the oportunity has been offered, whereby the non-specific nature of the affidavit might have been addressed and cleared up by actual testimony, that I have no other choice than to go ahead, go to trial, deny the severance, then listen to the Government's evidence when it comes in.

After I have heard the Government's evidence, the Court will be in a better posture, in a better position, if the Defendant Etienne Boeren-Veen still wishes to renew the motion to hear it again during the trial, probably at the close of the Government's case or earlier, if indicated.

So that is the posture in which I will leave that matter.

Are there any questions?

If not, let me make this other observation: I have a lot of cases from time to time, as you know, wherein there are conspiracies alleged. This is not different.

In each instance everyone files a standard motion for a James hearing.

I wish to point out to you that James itself, and certainly none of its progency, mandates or requires the holding of a hearing. That is left to the discretion of the Court.

I consider the minimal proffer that the Government made as a James proffer, citing to the two videotapes to be adequate and sufficient in and of itself to constitute the substantial and independent evidence of the existence of a conspiracy among all three of the defendants, and that they each participated in it, including their words as spoken individually and applicable as to each, of course, and not to others, for this purpose, and that the words were uttered in furtherance of a conspiracy.

I will listen to the evidence during trial, see if the Government's testimony further supports it or doesn't.